

POSITION DESCRIPTION: TELECOMMUNICATIONS COMMISSIONER

NOTE:

On behalf of the Minister for Communications and Information Technology, the Ministry of Economic Development is searching for a suitable candidate for appointment to the role of Telecommunications Commissioner. The term of appointment is likely to commence in September 2012.

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A. LEGISLATIVE FRAMEWORK

- 1 The Telecommunications Act 2001 establishes the position of Telecommunications Commissioner (“Commissioner”) as a member of the Commerce Commission (“Commission”) and sets out the Commissioner’s functions.
- 2 The Telecommunications Commissioner is appointed by the Governor-General on the recommendation of the Minister for Communications and Information Technology (“the Minister”).
- 3 The Telecommunications Commissioner is a member of the Commission as provided in section 9(3) of the Commerce Act 1986.

B. CRITERIA FOR APPOINTMENT

- 4 In making appointments, the Minister is guided by criteria set out in various pieces of legislation.
- 5 Government expects that part of the reward for serving on the board of a statutory body is the performance of public service that advances the interests of New Zealand. Appointments to statutory boards are predicted on the values and ethos of public service. Members must be aware of the importance of personal integrity and the need to declare

conflicts of interest, either potential or actual. Members must also be sure that they have the interest and enthusiasm needed to contribute effectively to the performance of the statutory entity throughout their term of membership.

- 6 Note that Cabinet has agreed that, as a general rule, public servants should not be appointed to statutory boards.

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| <p>Essential</p> <p>[under section 9(4) and (5) of the Telecommunications Act 2001]</p> | <p>No person may be recommended for appointment as the Telecommunications Commissioner unless, in the opinion of the Minister, that person is qualified for appointment, having regard to the functions and powers of the Commission, whether under the Telecommunications Act or any other enactment.</p> <p>A person is qualified for appointment by virtue of that person's knowledge of, or experience in, the telecommunications industry or any other industry, commerce, economics, law, accountancy, public administration, or consumer affairs.</p> |
| <p>Essential</p> <p>[under section 9(4)(a) and (b) of the Commerce Act 1986]</p> | <p>The Minister must not recommend a person for appointment as a member of the Commerce Commission unless,—</p> <ul style="list-style-type: none"> • in the opinion of the Minister, that person is qualified for appointment, having regard to the functions of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, or consumer affairs; and • in the case of a member who is a barrister or solicitor, the Minister has first consulted with the Attorney-General. |
| <p>Essential</p> <p>[under section 29 of the Crown Entities Act 2004]</p> | <p>A responsible Minister—</p> <ul style="list-style-type: none"> • may only appoint or recommend a person who, in the responsible Minister's opinion, has the appropriate knowledge, skills, and experience to assist the statutory entity to achieve its objectives and perform its functions; and • subject to the above, in appointing or recommending an appointment, must take into account the desirability of promoting diversity in the membership of Crown entities. |
| <p>Ideal Attributes</p> | <p>The Telecommunications Commissioner should:</p> <ul style="list-style-type: none"> • be familiar with the economic and financial analysis critical to regulatory decision-making; • have a good understanding of the critical issues faced by the telecommunications industry; • be familiar with the various approaches taken by significant overseas jurisdictions in regulating their telecommunications markets; • have the ability to oversee the investigation, monitoring and enforcement work of the Commerce Commission's telecommunications team; • have a clear sense of public accountability and understanding of the relationships between Government and Crown entities; • be experienced at working within statutory guidelines to make decisions; • have strong relationship management skills, including working effectively in a collegial, decision-making environment and developing valuable strategic connections with industry, consumers and other stakeholders; and • have strong communication skills, including the ability to reason objectively and convey ideas clearly and accurately in different fora and media. |

C. ROLE AND FUNCTIONS OF THE TELECOMMUNICATIONS COMMISSIONER

- 7 The Telecommunications Commissioner is responsible for the Commerce Commission's regulatory functions under the Telecommunications Act 2001. One of the main objectives of the Telecommunications Act 2001 is to promote competition in telecommunications markets for the long term benefit of end users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.
- 8 Under the Telecommunications Act, the Telecommunications Commissioner must make some specified types of regulatory decisions together with two other members of the Commission, but may make all other regulatory decisions alone.
- 9 See Appendix 1 for more detailed information on the role and functions of the Telecommunications Commissioner.

D. BACKGROUND ON THE COMMERCE COMMISSION

- 10 The Commission is an independent Crown entity under the Crown Entities Act 2004. The Commission is a specialist tribunal that has functions aimed at promoting competition in markets for the benefit of consumers, and regulating specified markets in which competition does not exist, or is very limited. It aims to foster and develop healthy competition amongst businesses, informed choice by consumers, and sound economic regulation through its enforcement, quasi-judicial and regulatory responsibilities under the Commerce Act 1986, Fair Trading Act 1986, Dairy Industry Restructuring Act 2001, Telecommunications Act 2001, and Credit Contracts and Consumer Finance Act 2003. The Commission is required to act independently under these five pieces of legislation.
- 11 In the course of carrying out the Commission's duties, board members are required to:
- consider market practices, misleading and deceptive conduct by traders and anti-competitive behaviour;
 - assess and apply the above Acts and associated Regulations;
 - maintain a respected and credible profile in the market; and
 - have an understanding of the Commission's role in the market and the wider economic environment in which it operates.
- 12 The Commission has between four to six members and currently comprises:
- one full-time Chair (x1);
 - one Deputy Chair (x1);
 - three other members (x3); and
 - one Telecommunications Commissioner (x1).
- 13 The responsible Minister may also appoint any person to be an Associate Member of the Commission. Associate Members are appointed only in relation to a specific matter or class of matters for which they have expertise. There is no limit on the number of Associate Members that may be appointed.
- 14 Further information on the Commission can be found on their website www.comcom.govt.nz.

E. REPORTING LINES

- 15 The Commerce Commission is accountable to the Minister of Commerce in accordance with the Crown Entities Act 2004 and the Commerce Act 1986.
- 16 In relation to the Telecommunications Act functions, the Telecommunications Commissioner makes recommendations to the Minister for Communications and Information Technology in accordance with the Crown Entities Act 2004 and the Telecommunications Act 2001.
- 17 The Commissioner is accountable to the Responsible Minister (Minister of Commerce), through the Chair of the Commission, in undertaking other duties under the Commerce Act 1986 and the Commission's other enabling legislation.

F. TIME COMMITMENT

- 18 The position of Telecommunications Commissioner is full time. The Commissioner has a statutory decision making role and also, along with other Commerce Commission members, participates fully in the governance of the Commission. While the Telecommunications Commissioner oversees the work of the Commission's telecommunications team, the position is not a managerial appointment.

Meetings of the Commerce Commission

19 As a member of the Commerce Commission, the Telecommunications Commissioner is expected to attend the Commission's board meetings. The board meets in its governance role about once a month. It meets for two and a half days per week in its adjudicative and enforcement role.

G. TERM OF APPOINTMENT

20 Under section 32(1)(b) of the Crown Entities Act, a member of an independent Crown entity may be appointed for up to five years or any shorter period stated in the notice of appointment.

H. REMUNERATION

21 Fees and allowances are set at a rate specified by the Remuneration Authority. The appointee is entitled to at least 4 weeks of annual leave - the actual amount is negotiable but is expected to be 4-5 weeks. The appointee is also entitled to public holidays, which in New Zealand total 11 days. Sick leave arrangements will be in accordance with the Commission's policies.

22 In determining remuneration, the Remuneration Authority is guided by the Remuneration Authority Act 1977, which includes giving regard to:

- the need to achieve and maintain fair relativity with the levels of remuneration received elsewhere;
- the need to be fair to both the person or group of persons whose remuneration is being determined and to the taxpayer;
- the requirements of the position; and
- the conditions of service to be enjoyed by the appointee in comparison to those enjoyed by persons whose remuneration and conditions of employment are, in the opinion of the Authority, comparable to those of the appointee.

Overseas Applicants

23 All overseas candidates should be advised to seek advice on tax, superannuation and other financial matters before progressing an application. If the person is currently not residing in New Zealand, any appointment will be subject to the appropriate immigration approvals being gained.

I. SELECTED RELEVANT PROVISIONS UNDER THE CROWN ENTITIES ACT 2004

24 The Crown Entities Act 2004 provides a consistent and coherent framework for Crown entity governance and accountability which are central to achieving a greater focus on results and strengthen the integration of Crown entities with the rest of the State Sector. A copy of the Act is available online at <http://www.legislation.govt.nz>.

Removal (section 39)

25 Members of an independent Crown entity may be removed from office by the Governor-General at any time for just cause, on the advice of the responsible Minister after consultation with the Attorney-General.

26 "Just cause", as defined under section 40, includes misconduct, inability to perform the functions of the office, neglect of duty, and breach of any of the collective or individual duties (depending on the seriousness of the breach) of members.

27 The removal must be made by written notice to the member (with a copy to the entity). The notice must state the reasons for the removal and the date on which the removal takes effect, which must not be earlier than the date on which the notice is received.

Resignation (section 44)

28 A member of a statutory entity may resign from office by written notice to the responsible Minister (with a copy to the entity). The resignation is effective on receipt by the responsible Minister of the notice, or at any later time specified in the notice.

Collective Duties of Board Members (sections 49 to 52)

29 The collective duties of board members are to ensure the entity acts consistently with its objectives, functions, its Statement of Intent, and Output Agreement and that the entity's functions are performed efficiently, effectively and consistently with the spirit of service to the public, and in a financially responsible manner.

Individual Duties of Board Members (sections 53 to 57)

30 The duties of individual board members are to comply with the Crown Entities Act and the entity's Act; to act with honesty and integrity; act in good faith and not at the expense of the entity's interests; act with reasonable care, diligence and skill; and not to disclose or make use of information that otherwise would not be available to them.

Requirements before Appointment (section 31)

31 Before a person is appointed as a member of a statutory entity, the person must:

- a. consent in writing to being a member;
- b. certify that he or she is not disqualified from being a member under section 30(2) of the Act; and
- c. disclose to the responsible Minister the nature and extent (including monetary value, if quantifiable) of all interests that the person has at that time, or is likely to have, in matters relating to the statutory entity.

32 The following persons are disqualified from being a member of a statutory entity [under section 30(2)]:

- a) a person who is an undischarged bankrupt;
- b) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, or the Securities Act 1978, or the Securities Markets Act 1988, or the Takeovers Act 1993;
- c) a person who is subject to a property order under the Protection of Personal and Property Rights Act 1988;
- d) a person in respect of whom a personal order has been made under that Act that reflects adversely on the person's -
 - (i) competence to manage his or her own affairs in relation to his or her property; or
 - (ii) capacity to make or to communicate decisions relating to any particular aspect or aspects of his or her personal care and welfare;
- e) a person who has been convicted of an offence punishable by imprisonment for a term of 2 years or more, or who has been sentenced to imprisonment for any other offence, unless that person has obtained a pardon, served the sentence, or otherwise suffered the penalty imposed on the person;
- f) a member of Parliament;
- g) a person who is disqualified under another Act.

- 33 As part of the appointment process run by the Ministry of Economic Development (“Ministry”), candidates who are shortlisted for the role will be required to complete a *Disclosure of Interest Form*.
- 34 The information that is disclosed by the candidate enables the responsible Minister to know the relevant interests and any conflicts that a person may have in relation to an appointment to a statutory entity. The information is used to assess whether a candidate would be able to contribute effectively to the entity’s affairs, and where conflicts are identified, to ensure that these can be managed appropriately.
- 35 A particular interest that is, or is likely to be, connected to a matter relating to the statutory entity will not necessarily make a person unacceptable for appointment. The disclosure is used as a basis for discussion among Ministry officials, the person concerned and the entity to provide assurance to the Minister that measures are in place, or can be put in place, to manage any conflicts.
- 36 An unmanageable interest, which arises if the interest is unavoidable and cannot be managed through an appropriate mechanism, may mean that a candidate is not suitable for appointment.

J. INFORMATION HELD BY THE MINISTRY UNDER THE PRIVACY ACT 1993 AND THE OFFICIAL INFORMATION ACT 1982

- 37 Under the Privacy Act 1993, the Ministry of Economic Development:
- will protect the personal information that it holds against any loss, unauthorised access, or misuse;
 - will not keep personal information any longer than is required for the purposes for which the information may lawfully be used (for instance, the possibility of judicial review);
 - will not use any personal information obtained in connection with one purpose for any other purpose, unless it has reasonable grounds to do so; and
 - will limit the disclosure of personal information to other persons or agencies.
- 38 Individuals are entitled to access information held about them by a government department under the Official Information Act 1982.
- 39 Official Information Act requests may be made for information on nominations, appointees, remuneration, etc. In responding to such requests, the Ministry will carefully balance the public interest, the privacy of the individuals concerned, and the need to maintain the credibility of statutory appointment processes.

K. OVERVIEW OF THE APPLICATION PROCESS AND ESTIMATED TIMEFRAME

Online Application

- 40 Applications must be completed online by logging onto the COMU Appointments website of the Treasury’s Crown Ownership Monitoring Unit (www.boardappointments.co.nz). Click on the “*Positions Under Consideration*” tab, and follow the instructions.
- 41 Applications will be accepted until 5:00pm on Friday, 27 April 2012.

Short listing and Interview Stage

- 42 A panel will be convened to select applicants to be invited for an interview. An official from the Ministry of Economic Development will contact candidates for this purpose.

43 The Ministry will also undertake due diligence checks (covering probity/background checks, reference checks and conflict of interest discussions) to be able to assess an individual's suitability for appointment.

Discussion by the Appropriate Committee, Cabinet and Caucus

44 Once the responsible Minister has selected the candidate who is considered to best meet the full range of requirements to be an effective Telecommunications Commissioner and board member of the Commerce Commission, the appointment proposal will be discussed by the Appointments and Honours Committee (APH), Cabinet and Caucus. Depending on the outcome of these discussions, the Minister will then make an appointment recommendation to the Governor-General.

Estimated Timeframe

45 The target schedules for various stages in the process are below. Note that these are only indicative and are subject to change:

- Short listing - early May
- Interviews - mid to late May
- Reference checks and conflict discussions - late May to early June
- Decision by Minister - mid June
- Consultation with other Ministers and government departments - late June to early July
- APH, Cabinet and Caucus stages - mid July
- Recommendation to Governor-General - late July
- Term of appointment is expected to begin by early September

Inquiries

46 Applications must be done through the website www.boardappointments.co.nz but for any inquiries, you may contact either:

- Patricia Canlas at +64 4 901 1233 or Patricia.Canlas@med.govt.nz
- Jessica Lawson at + 64 4 474 2189 or Jessica.Lawson@med.govt.nz.

ROLE AND FUNCTIONS OF THE TELECOMMUNICATIONS COMMISSIONER

1 Many of the functions of the Commerce Commission under the Telecommunications Act 2001 (the Act) can be performed by the Telecommunications Commissioner acting alone.

2 Section 10 of the Act provides:

10 Performance of Commission's functions

- (1) Subject to subsection (2) and sections 15 and 17,—
 - (a) the Telecommunications Commissioner and 2 other members of the Commission must—
 - (i) make every determination in respect of a designated multinet network service under section 39; and
 - (ii) make every pricing review determination under section 51; and
 - (iii) make every determination in respect of a TSO (Telecommunications Service Obligation) instrument under section 90; and
 - (b) the Telecommunications Commissioner must report to the Minister about every alteration to Schedule 1 in any of the ways set out in sections 65 to 67, and the report must include the views of 2 other members of the Commission; and
 - (c) every function of the Commission under this Act (other than any of the functions set out in paragraphs (a) and (b)) must be performed—
 - (i) by the Telecommunications Commissioner alone; or
 - (ii) if the Telecommunications Commissioner requests the chairperson of the Commission to make 2 other members of the Commission available for the performance of a particular function and the chairperson agrees to that request, by the Telecommunications Commissioner and 2 other members of the Commission.
- (2) If there is no Telecommunications Commissioner or if the Telecommunications Commissioner is for any reason unable to perform the functions of the Commission that would otherwise have been performed by him or her under this Act,—
 - (a) those functions must be performed by the chairperson of the Commission; and
 - (b) every reference in this Act to the Telecommunications Commissioner must, unless the context otherwise requires, be read as a reference to the chairperson of the Commission.
- (3) The chairperson of the Commission is responsible for determining which members of the Commission, other than the Telecommunications Commissioner, must perform the functions referred to in subsection (1).
- [(4) The quorum requirements in section 15(4) of the Commerce Act 1986 do not apply if the Telecommunications Commissioner is performing functions alone under section 10(1)(c)(i).]

Sector Monitoring and Information dissemination (section 9A)

- 3 The Commission monitors competition in telecommunications markets and the performance and development of telecommunications markets, and conducts inquiries, reviews, and studies (including international benchmarking) into matters relating to the telecommunications industry for the long-term benefit of end-users of telecommunications services within New Zealand. It makes available reports, summaries, and information about these things.
- 4 The Telecommunications Commissioner can perform these functions alone under section 10(1)(c).

Investigations and recommendations on changes to regulated services (Schedule 3 and 3A)

- 5 The Commission undertakes investigations into whether Schedule 1 (which records the regulated services) should be altered by adding, removing or amending a service, and any undertakings that are made during the investigation, and makes recommendations to the Minister.
- 6 The Telecommunications Commissioner reports to the Minister, but the final report must include the views of 2 other members of the Commission under section 10(1)(b).

Determinations (Part 2)

- 7 The Commission determines the terms and conditions of supply of regulated services between access seekers and access providers.
- 8 The Telecommunications Commissioner can make most of these determinations alone under section 10(1)(c), but must make determinations with 2 other members of the Commission, under section 10(1)(a) in respect of:
 - i designated multinetwork services (i.e. rules for number portability);
 - ii determination of the “final price” following a pricing review.

Operational Separation of Telecom (Part 2A and Telecom’s undertakings)

- 9 The Commission enforces Telecom’s separation undertakings made under Part 2A, and may request variations to Telecom’s separation plan to the Minister.
- 10 The Telecommunications Commissioner can perform these functions alone under section 10(1)(c).
- 11 Telecom’s separation undertakings specify functions of the Commission. The Telecommunications Commissioner can perform these functions alone under clause 2.6 of the undertakings (this clause mirrors section 10(2) and (3) of the Act).

Information disclosure (Part 2B)

- 12 The Commission must require accounting separation of Telecom and disclosure of separation information about its business activities, and may require access providers to prepare and disclose information about the operation and behaviour of businesses that provide regulated services.
- 13 The Telecommunications Commissioner can perform these functions alone under section 10(1)(c).

Telecommunications service obligations (Part 3)

- 14 The Commission annually determines the cost of telecommunications service obligations and allocation among liable persons. It also monitors and assesses TSO providers’ compliance with these obligations.
- 15 Final cost allocation determination are made by the Telecommunications Commissioner and 2 other members of the Commission under section 10(1)(a)(iii), but the Telecommunications Commissioner can perform these functions alone under section 10(1)(c).

Enforcement (Part 4A)

- 16 The Commission takes enforcement action in the form of civil infringement notices, seeking pecuniary penalty orders from the High Court.
- 17 The Telecommunications Commissioner can perform these functions alone under section 10(1)(c).

Telecommunications access codes (Schedule 2)

- 18 The Commission approves and amends industry codes in accordance with Schedule 2.
- 19 The Telecommunications Commissioner can perform these functions alone under section 10(1)(c).